No. 13941

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES WILLIAM AFFELDT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on December 3, 1952, under Section 462 of Title 50, App. United States Code.

On December 22, 1952, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on March 12, 1953.

On March 12, 1953, appellant was tried in the United States District Court for the Southern District of California, before the Honorable William C. Mathes, sitting without a jury, and was found guilty as charged in the Indictment.

On April 7, 1953, appellant was sentenced to imprisonment for a period of four years and judgment was so entered. Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

II.
STATUTES INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment

[U. S. C., Title 50, App., Section 462—Universal Military Training and Service Act.]

The grand jury charges:

Defendant Charles William Affeldt, Jr., a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 81, said board being then and there duly created and acting, under the Selective Service System established by said act, in Ventura County, California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 13, 1952, in Los Angeles County, California, within the Central Division of the Southern District of California; and on or about said date in Los Angeles County, California, within the division and district aforesaid, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do."

On December 22, 1952, the appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., be-

fore the Honorable Ernest A. Tolin, United States District Judge, and entered a plea of not guilty to the offense charged in the Indictment.

On March 12, 1953, the case was called for trial before the Honorable William C. Mathes, United States District Judge, sitting without a jury, and on March 19, 1953, appellant was found guilty as charged in the Indictment.

On April 7, 1953, appellant was sentenced to imprisonment for a period of four years in a penitentiary.

Appellant assigns as error the judgment of conviction on the following grounds:

A—The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence.

B—The District Court erred in convicting the appellant and entering a judgment of guilty against him.

C—The District Court committed reversible error in refusing appellant the right to use the secret FBI investigative report at the trial as evidence to determine whether the summary of the adverse evidence given to the appellant by the Hearing Officer of the Department of Justice was fair and adequate as required by due process of law, the Act and the regulations.

IV.

STATEMENT OF THE FACTS.

On September 10, 1948, Charles William Affeldt, Jr., registered with Local Board No. 81, Ventura, California. He was twenty-two years of age at the time, having been born on September 11, 1926.

On November 18, 1948, Charles William Affeldt, Jr., filed with Local Board No. 81, SSS Form 100, Classification Questionnaire, and by signing Series VI of this questionnaire informed the Local Board of his claim for exemption as a minister of religion. Appellant also signed Series XIV, claiming exemption as conscientious objector.

On November 18, 1948, Affeldt filed with Local Board No. 81 SSS Form 150, Special Form for Conscientious Objector.

On November 22, 1948, Affeldt filed an Affidavit of Dependency, claiming he had three dependents.

On November 30, 1948, Affeldt was classified 3-A by the Local Board and he was sent an SSS Form 110, Notice of Classification, the following day.

On October 23, 1951, Affeldt was classified 1-O by the Local Board and he was sent an SSS Form 110, Notice of Classification, the following day.

On November 2, 1951, Affeldt requested a personal appearance before the Local Board. A personal appearance before the Local Board was granted for November 6, 1951.

On November 6, 1951, Affeldt appeared before the Local Board. Affeldt was continued in Class 1-O and was notified of this action by the mailing of an SSS Form 110, Notice of Classification, to him.

On November 15, 1951, Affeldt appealed his classification of 1-O.

On December 11, 1951, Affeldt was classified 1-O by the Appeal Board.

On December 13, 1951, Affeldt was mailed a revised SSS Form 150, Special Form for Conscientious Objector.

On December 18, 1951, Affeldt returned the revised SSS Form 150, Special Form for Conscientious Objector, to the Local Board. He had not completed the form.

On February 19, 1952, Affeldt was classified 1-A by the Local Board and he was so notified by the mailing of an SSS Form 110, Notice of Classification, to him.

On February 27, 1952, Affeldt requested a personal appearance before the Local Board. A personal appearance before the Local Board was granted for March 4, 1952.

On March 4, 1952, Affeldt appeared before the Local Board. Affeldt was continued in Class 1-A and he was so notified by the mailing of an SSS Form 110, Notice of Classification, to him.

On March 18, 1952, the Appeal Board reviewed Affeldt's Selective Service file and determined that he should not be classified either in Class 1-A-O or in Class 1-O and forwarded the file to the Department of Justice. A hearing was held by the Department of Justice Hearing Officer on July 28, 1952. The Hearing Officer recommended that Affeldt should be classified in Class 1-A.

On September 25, 1952, Affeldt was classified 1-A by the Appeal Board and he was advised of this action by the Local Board on October 2, 1952.

On October 17, 1952, SSS Form 252, Notice to Report for Induction, was mailed to Affeldt, ordering him to report for induction into the armed forces of the United States on November 13, 1952, at Los Angeles, California.

On November 13, 1952, Affeldt reported for induction as ordered, but refused to submit to induction into the armed forces of the United States.

V.

ARGUMENT.

A. Replying to Appellant's Assignment of Error, the Government Contends That the Classification Given the Appellant of 1-A Was Not Arbitrary and Capricious and Was Supported by Evidence Establishing a Basis in Fact.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling. In *Richter v. United States,* 181 F. 2d 591 (9th Cir.), this Court says:

> "Congress can call everyone to the colors, and immunity from military service arises solely through congressional grace in pursuance of traditional American policy of deference to conscientious objection, and there is no constitutional right to exemption because of conscientious objection or religious calling or conviction or activities."

Accord:

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

Congress has granted exemptions and deferments from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service System. This procedure is administrative in nature, even though one may be criminally prosecuted for failure to comply with the orders of the Selective Service System.

Falbo v. United States, 320 U. S. 549;

Williams v. United States, 203 F. 2d 85.

The duty to classify, to grant or deny exemptions rests upon the draft boards, local and appellate. The burden

is upon a registrant claiming an exemption or deferment to establish his eligibility therefor to the satisfaction of the local board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);
Davis v. United States, 203 F. 2d 853 (8th Cir.).

Each registrant is presumed to be available for military service.

32 C. F. R., Sec. 1622.1(c);
United States v. Schoebel, supra.

Every registrant who fails to establish to the satisfaction of a local or appellate board his eligibility for exemption or deferment is placed in Class 1-A.

32 C. F. R., Sec. 1622.10.

In the instant case, both the local and appellate boards considered the claims for exemption made by the appellant. Both boards rejected the appellant's claim based upon the information presented to them.

The classification by the Local Board and thereafter by the Appeal Board, made in conformity with the regulations, was final. The United States Supreme Court in *Estep v. United States,* 327 U. S. 114, at pages 122-133, in considering this point, says:

> ". . . The provision making the decision of the local boards 'final' means to us that Congress was not to give administrative action under this Act the customary scope of judiciary review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity

with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The Selective Service file of the appellant in the present case indicates sufficient basis in fact for the denial of the local and appellate boards of his claims as a minister and conscientious objector.

There was, therefore, no error in the ruling of the Trial Court in refusing to grant appellant's Motion for Judgment of Acquittal.

B. The Reclassification of the Appellant by the Local Board Was Not Arbitrary and Capricious.

The classification of registrants by Local Boards is provided by 50 U. S. C. A., App., Section 460, which provides in pertinent part:

". . .

(b) The President is authorized—

(3) To create and establish . . . local boards . . . such local boards, . . . shall, under rules and regulations prescribed by the President, have the power . . . to hear and determine, . . . all questions or claims, with respect to inclusion or exemption or deferment from, training and service under this title (said sections), of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final, except where an appeal is authorized and is taken in accordance with such rule and regulations as the President may prescribe . . ."

The limitations placed upon a trial court in the review of the classification given a Selective Service registrant were defined in the case of *Cox v. United States,* 332 U. S. 442. The Court in the *Cox* case, *supra,* says at page 448:

> "The scope of review to which petitioners are entitled, however, is limited; as we said in Estep v. United States, 327 U. S. 114, 122-3: 'The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the *courts are not to weigh the evidence* to determine whether the classification made by the local boards was justified. *The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous.* The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.' " (Emphasis added.)

Selective Service Regulations, Section 1622.20 (32 C. F. R. 1622.20) provided:

> "1622.20 Class IV-E: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety or Interest—
>
> (a) In Class IV-E shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6(j) of Title I of the Selective Service Act of 1948 provides in part as follows: 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.' "

This section of the Selective Service Regulations defines in broad terms the qualifications necessary for classification as a conscientious objector in classification IV-E. The application of this description to particular registrants is a duty imposed upon the Local Board. The Local Board was left to determine how and when a registrant claiming exemption from military service by reason of conscientious objection was to be qualified. The exercise of that discretion, even though it may have been erroneous, is final, in the absence of arbitrary or capricious conduct on the part of the Local Board so classifying a registrant.

Cox v. United States, supra.

To aid the Local Board in its determination of the conscientious objector claims of registrants, the Selective Service System uses SSS Form 150, Special Form for Conscientious Objector. The questions and answers given thereto by a registrant are the basis of a classification by a Local Board within the broad terms of Selective Service Regulations, Sections 1622.6 and 1622.20. The burden is upon the registrant to maintain and prove his claim within these categories. *Davis v. United States,* 203 F. 2d 853. This burden was not met by the appellant in the present case as evidence by the classification given him by the Local Board.

Section 1625.1(a) provides that no classification is permanent. Section 1625.1(b) requires the registrant to report to the local board any facts that might cause the registrant to be classified differently. Section 1625.1(b) requires the local board to keep itself informed as to the status of registrant.

Section 1625.2 provides as follows:

> *"When Registrant's Classification May Be Reopened and Considered Anew*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

The question presented here for consideration, therefore, is whether or not the Local Board acted arbitrarily and capriciously in classifying the appellant 1-A. The evidence shows that appellant was mailed a revised SSS

Form 150, Special Form for Conscientious Objector. This the Local Board had a right to do. The appellant refused to fill out the SSS Form 150, and notified the Local Board for the reasons for his act. He said he would not accept work of national importance. Induction in Class 1-O would require him to perform this type of work. Part of the eligibility for classification as a conscientious objector is the acceptance of the burdens attached to that classification. It can be argued, therefore, that by voicing his refusal to accept the burdens of work of national importance attached to his classification in Class 1-O, the Local Board could reasonably have determined that though appellant had not specifically withdrawn his claim as a conscientious objector, he was not eligible for such classification. That is, he had not sustained the burden of establishing his eligibility for exemption.

No evidence of arbitrary or capricious conduct on the part of the Local Board being shown by the evidence and there being a basis in fact, the Trial Court properly refused to grant appellant's Motion for Judgment of Acquittal.

C. There Was No Error Made by the Local Board in Refusing to Classify Appellant as a Minister of Religion.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling. In *Richter v. United States,* 181 F. 2d 591 (9th Cir.), this Court said:

> "Congress can call everyone to the colors, and immunity from military service arises solely through congressional grace in pursuance of traditional Amer-

ican policy of deference to conscientious objection, and there is no constitutional right to exemption because of conscientious objection or religious calling or conviction or activities."

Accord,

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Congress has granted exemption and deferment from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service System. This procedure is administrative even though one may be criminally prosecuted for failure to comply with the orders of the Selective Service System.

Falbo v. United States, 320 U. S. 549;

Williams v. United States, 203 F. 2d 85 (9th Cir.).

The duty to classify, to grant or deny exemptions rests upon the draft boards, local and appellate. The burden is upon a registrant to establish his eligibility for deferment, or exemption, to the satisfaction of the local board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);

Davis v. United States. 203 F. 2d 853 (8th Cir.).

Each registrant is considered to be available for military service.

32 C. F. R., Sec. 1622.1(c);

United States v. Schoebel, supra.

Every registrant who has failed to establish to the satisfaction of the local board that he is eligible for classification in another class is placed in Class 1-A.

32 C. F. R., Sec. 1622.10.

The local board carefully considered the claim of the appellant for a minister's exemption, Class 4-D, at a meeting of the local board. The Appeal Board considered this claim also, and both boards rejected it based on the information they had on hand.

The classification of the local board, and thereafter of the Appeal Board is final. The United States Supreme Court in *Estep v. United States,* 327 U. S. 114 at pages 122-133, states in this regard:

> ". . . The provision making the decision of the Local Board's 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judiciary review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Accord:

> *Martin v. United States,* 190 F. 2d 774 (4th Cir.), cert. den. 342 U. S. 872.

In the present case, the appellant was employed on a full-time basis in a secular activity. Both the Local Board and the Appellate Board reviewing the file could reasonably have determined that appellant's ministerial activities were incidental in nature to his secular activity, so that he would not be entitled to an exemption as a minister of religion. The evidence does not indicate any arbitrary

or capricious action on the part of either the local or appellate board, and therefore, the Trial Court properly denied appellant's Motion for Judgment of Acquittal.

D. There Was No Error in the Refusal of the Trial Court to Receive Into Evidence the Investigative Report of the Federal Bureau of Investigation.

It is established that exemption by reason of religious training and belief is not a constitutional right, *United States v. MacIntosh,* 283 U. S. 605; *Girouard v. United States,* 328 U. S. 61. However, Congress has provided for exemption by reason of religious training and belief. In making such a provision, Congress established a certain procedure to be followed in the procuring of these exemptions. Establishment of such a procedure has created certain "rights" which must be afforded all persons who can establish eligibility under its provisions. A variance from this procedure which prejudices the registrant in his request for exemption is admittedly a denial of due process.

Title 50, App., United States Code, Section 456, provides for deferments and exemptions from military training and service. Subsection (j) of Section 456 provides in pertinent part:

> "(j) . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such

claim to the Department of Justice for *inquiry and hearing*. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned. . . ." (Emphasis added.)

It is with the "inquiry and hearing" referred to in subsection (j) of Section 456 of the Universal Military Training and Service Act that we are concerned in the present case. Under the authority of subsection (j), the Attorney General has established certain procedures to be followed in the inquiry and hearing to be held by the Department of Justice. Provision is made for an investigation and report by agents of the Federal Bureau of Investigation. These reports are then forwarded to a Hearing Officer for his use in the hearing he conducts with respect to the character and good faith of the claims of conscientious objection of each particular registrant.

Prior to such a hearing, the Hearing Officer mails to the registrant a Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed. These instructions provide in part:

"2. *Upon request* therefor by the registrant at any time *after receipt by him of the notice of hearing, and before the date set for the hearing,* the Hearing Officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat the claim of the registrant, such request being granted

to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence." (Emphasis added.)

Since there is no constitutional right to exemption because of religious training and belief, any claimed denial of due process must necessarily, then, be based upon a variance from the procedures established by Congress or by administrative officials under a proper delegation of powers.

The evidence in the present case discloses that a request was made by the appellant for adverse information held by the Hearing Officer. However, this request was not made until the appellant appearing for his hearing. [Tr. pp. 42-43.][1] It was, therefore, not a timely request made upon the Hearing Officer.

Assuming that it can be argued that appellant's request was timely, the Court made an *in camera* examination of the investigative reports of the Federal Bureau of Investigation and determined that their evidentiary value was outweighed by the public interest in preserving the confidential nature of executive documents. It is within the power of the Trial Court to exclude irrelevant, immaterial and incompetent evidence. Furthermore, procedural irregularities or omissions which would not result in prejudice to the appellant are to be disregarded.

United States v. Nugent, 346 U. S. 1;
Martin v. United States, 190 F. 2d 775;
Atkins v. United States, 204 F. 2d 269.

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[1]"Tr." refers to "Transcript of Record."

VI.
CONCLUSION.

Appellant was properly classified in Class 1-A by the Local Board.

Reopening of appellant's classification by the Local Board was not a denial of due process and is provided for in the Selective Service Regulations.

Appellant was afforded all his rights under the Universal Military Training and Service Act.

It is, therefore, respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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